SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 591

COOPERATIVE TRANSIT COMPANY, COOPERATIVE BUS COMPANY, AND THE COOPERATIVE BUS COMPANY, CORPORATIONS,

Petitioners,

vs.

THE STATE ROAD COMMISSION OF WEST VIRGINIA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions.

There is no opinion. An opinion in a collateral cause bearing on the questions involved, is printed as an appendix to this brief (App. p. 25).

Jurisdiction.

Jurisdiction is based upon Judicial Code, Section 240 (a) as amended by Act of February 13, 1925 (28 U. S. C. A. §348 (a)).

In view of the union of petition and brief a re-statement of the questions presented and of the specifications of error to be urged is here omitted and not presented a second time.

The Facts.

The essential facts are set out in the statement of Petition (p. 4) and are not repeated.

Argument.

Briefly the questions arise from the attempt of the State Road Commission to regulate the rates of toll upon two interstate bridges erected over the navigable Ohio River at Wheeling, West Virginia, and connecting the West Virginia and the Ohio shores. The petitioners asked for prohibition in the Supreme Court of Appeals of West Virginia, which was denied without opinion (R 1).

Petition for rehearing was likewise denied without opinion (R 14).

A toll bridge over a navigable stream is an instrumentality of commerce and the traffic over it is interstate commerce, *Overstreet* v. *North Shore Corporation*, (1943), 318 U. S. 125; *Shrader* v. *Traction Co.* (1919) 84 W. Va. 1, 99 S. E. 207. There can be no doubt that the setting of the rates of toll of these bridges is a direct control of part of the stream of interstate commerce, flowing by motor vehicle over a great national arterial highway (Route 40). Thus any question of the exercise by the State of West Virginia of its police powers in local matters is eliminated and as well the question of how far a state, in controlling interstate traffic, may indirectly affect interstate commerce. The safety of the public and the convenient use of the bridge is not involved. "Local problems" fall within a traditional category well beyond the periphery of the direct regulation involved here, *California* v. *Thompson* (1941), 313 U. S. 109, 61 Sup. Ct. 930. The action of the State Road Commission of West Virginia is direct action within that area of powers wholly and completely preempted by the National

Government by virtue of the Commerce Clause of the Constitution. The powers of the National Government are plenary and complete and without limitation other than are prescribed in the Constitution, so no state activity can thwart it. *U. S.* v. *Wrightwood Dairy Co.* (1942) 315 U. S. 110, 62 Sup. Ct. 523. Whether Congress has acted or not, the states are impotent to invade the area of direct control.

I.

The decision of the Supreme Court of Appeals of West Virginia is in direct violation of the Commerce Clause of the Constitution of the United States (Article I, Section 8) by virtue of which the power of the Congress to regulate this Commerce is supreme and plenary and wholly withdrawn from the states. In the absence of action by Congress, the Constitution of its own force immunizes interstate commerce from the direct control of the states.

National exigencies require control of interstate commerce by a single authority. The fixing of an interstate rate is forbidden to a state. *Minnesota Rate Cases (Simpson* v. *Shepard)*, 230 U. S. 352, 32 L. Ed. 729. *Hanley* v. *Kansas City Ry.* (1903), 187 U. S. 617, 47 L. Ed. 333. The limits of authority of the states in relation to railroad carriers was settled in the Minnesota rate cases. No reason appears why a state should now control the rates of a different instrumentality of commerce. That area of authority permitted to states *indirectly* to affect interstate commerce, in the absence of Congressional action, has been rigidly confined to intra-state transactions, where a state exercises its police power within its own territorial limits. The direct control of interstate commerce by a state exercising its police power, even in the absence of action by Congress, has never been conceded. Nor has there ever been a suggestion that a state may, as here, reach beyond its borders and directly

regulate commerce originating and ending in another state, as well as that passing to and fro between two states. *Public Service Commission* v. *Attleboro* (1927), 273 U. S. 83, 47 Sup. Ct. 294.

In the instant case the bridges are physically located in two states with a navigable river between them. The control of bridge rates can easily mean the control in practical effect of all traffic moving over the bridges.

II.

The decision of the Supreme Court of Appeals of West Virginia conflicts with decisions of this court and other courts holding that a state has no power to regulate the tolls of interstate bridges over navigable streams.

Covington v. *Cincinnati Bridge Co.* (1893), 154 U. S. 204, 38 L. Ed. 962.

The Bridge Company was indicted for charging greater tolls than provided by Kentucky law. The power of the State of Kentucky to regulate the bridge over the Ohio between Covington, Kentucky, and Cincinnati, Ohio, was denied by this Court on appeal, holding that the bridge was an instrument of interstate commerce.

The courts of three sister states follow the Covington case.

Broadway and Newport Bridge Co. v. *Commonwealth* (1917), 173 Ky. 172. *City of Leavenworth* v. *Terminal Ry. Co.* (1929), 127 Kan. 474. *Burkburnett Bridge Co.* v. *Cobb* (1925), 108 Okla. 21. These three state courts having the specific question to decide held against the authority of a state to regulate the tolls of an interstate bridge over a navigable stream, on the authority of the *Covington* case.

III.

The Decision of the Supreme Court of Appeals of West Virginia conflicts with the General Bridge Act of 1906 and its 1930 and 1935 amendments, placing jurisdiction of toll bridges over navigable streams within the exclusive jurisdiction of the Secretary of War.

The General Bridge Act of 1906: Amendments of 1930 and 1935.

The General Bridge Act of 1906 entitled "An Act to regulate the construction of bridges over navigable waters" approved March 23, 1906 (§ 4), 34 Stat. 85, § 494 T, 33 U. S. C. A. (33 U. S. C. A. § 494) was designed to establish uniform regulations for the construction and operation of bridges over navigable streams.

In reference to tolls the pertinent provisions are:

> "If tolls shall be charged for the transit over any bridge constructed under the provisions of this chapter * * * such tolls shall be reasonable and just * * * and the Secretary of War may, at any time, and from time to time prescribe the reasonable rates of toll for such transit over such bridge * * *" (33 U. S. C. A. § 494) 34 Stat. 85.

From 1906 to 1930 the General Bridge Act applied only to the tolls of bridges constructed pursuant to its provisions, automatically excluding the regulation of tolls of bridges constructed prior to 1906.

The 1930 Amendment to the General Bridge Act.

In 1930 by amendment (Act, June 27, 1930) 46 U. S. Stat. at L. p. 82, 33 U. S. C. A. § 498 (b)), Congress extended the General Bridge Act, so far as regulation of tolls was concerned, to include previously authorized bridges where Congress had retained the right to alter, amend or repeal the Act authorizing the bridges.

The Act was entitled "An Act to provide for the regulation of tolls over certain bridges", Section 1, 46 Stat. 821 (498 b) providing:

> "Any bridge authorized, prior to March 23, 1906, by Act of Congress specifically reserving to Congress the right to alter, amend, or repeal such Act, shall, in respect of the regulation of all tolls, be subject to the provisions of the Act entitled 'An Act to regulate the construction of bridges over navigable waters', approved March 23, 1906."

Three of the four bridges whose tolls are involved were authorized under Acts of Congress each of which specifically reserved in Congress the right to alter, amend or repeal (R. 10). These Acts are:

1. December 17, 1872 (17 U. S. Stat. at L. 398) entitled "An Act to authorize the construction of bridges over the Ohio River and to provide the dimensions of the same". Section 7 thereof provided:

> "* * * *that the right to alter or amend this Act* * * * *is hereby expressly reserved.*"

2. February 14, 1883 (22 U. S. Stat. at L. 414) amended sections 2 and 4 of the foregoing Act of 1872 by providing for different structural specifications, and in Section 5 provided:

> "*That the right to alter, amend or repeal this Act, as set forth in Section 7 of the Act hereby amended, is hereby reserved.*"

Two of the bridges involved were built in the 1890s pursuant to the above Acts of 1872 and 1883, and the regulation of their tools came within the express language of the 1930 amendment to the General Bridge Act of 1906; one of the bridges was rebuilt in the 1890s (R. 7, 10).

The 1935 Amendment.

The General Bridge Act of 1906 and the first amending act of 1930 expressly took jurisdiction of tolls over all bridges authorized by Congress whether before or after the year 1906; the only requirement being as to those authorized previous to 1906 that Congress had retained the right to alter, amend and repeal in the authorizing act.

By the second amendment to the General Bridge Act of 1906 of August 21, 1935, (C. 597, sec. 2, et seq. 49 Stat. 671; 33 U. S. C. A. 503) it provided:

> "Tolls for passage or transit over *any* bridge over *any* of the navigable waters of the United States, if such bridge is used for purposes of travel or transportation in interstate or foreign commerce, shall be just and reasonable." (Italics ours.)

and placing jurisdiction in the Secretary of War (Sec. 504).

> "The Secretary of War is authorized, either upon complaint or upon his own initiative to conduct an inquiry at any time * * *"

This second amendment excepts from its operation the bridges coming under the 1906 Act and the 1930 Amendment, also intra-state bridges built under State Legislative authority over navigable streams and bridges whose tolls are prescribed by contract with a state, political subdivision or municipality.

The tolls of certain of the group of four bridges comes under the second amendment, one of which is the historic Suspension Bridge, 93 years old, which figures in the famous cases before the Supreme Court of the United States (R. 7) *Pennsylvania* v. *Wheeling & Belmont Bridge Company* (1851), 13 How. 518, 14 L. Ed. 249 and *Pennsylvania* v. *Wheeling & Belmont Bridge Company* (1855), 59 U. S. (18 How.) 421, 15 L. Ed. 435.

The 1935 Amendment contains a detailed and comprehensive mechanism for rate-making and providing for a specified course of appeal.

Congress, by this series of Acts, has made manifest its intention to exercise the constitutional powers granted under the Commerce Clause to the very limit. It first took supervision over merely the construction of bridges and the exclusive authority of the Secretary of War in that respect is not now debatable; in 1906 it extended that authority to the rates of toll bridges (which authority is no different in origin or essence than the authority already possessed and exercised by the Secretary of War) and it gradually extended the authority by the 1930 and 1935 amendments to cover practically all toll bridges in the United States over navigable streams. The General Bridge Act of 1906 and its two amendments have not been interpreted by this Court, though the cases arising under the General Bridge Act and its two Amendments proceed in Federal Courts and State jurisdictions on the basis of undoubted plenary Federal power both in the construction of the bridges as well as over rates.

Decisions in Cases; Authorities where the Secretary of War has taken Jurisdiction of Tolls under the General Bridge Act; showing also the Application of the General Bridge Act to Tolls

The jurisdiction of the Secretary of War under the General Bridge Act has been exercised and enforced. *Clarksburg-Columbus Short Route Bridge Co.* v. *Woodring* (1937) 89 F. (2d) 788; Reversed on other grounds (1938) 302 U. S. 658. The two bridges concerned span the Ohio, south of Wheeling, and were found by the Court to be "* * * Subject to the lawful orders of the Secretary of War prescribing toll rates under the Act of Congress of March 23,

1906 * * *" The case turned upon the methods employed by the Secretary of War in fixing the rates of toll. *Omaha Packing Company* v. *Pittsburgh F. W. & C. Ry. Co.* (1941) 120 F. (2d) 594, C. C. A. 7th. (The Court decided that the General Bridge Act was paramount to state authority exercised through ordinances of the City of Chicago.) *U. S.* v. *Columbia River-Longview Bridge Co.* (1938) 99 F. (2d) 287 (involving an interpretation of the General Bridge Act in respect to tolls to be paid for troops and munitions of the United States. *Gouax* v. *Boray* (1939) 105 F. (2d) 256; Cert. denied 308 U. S. 607 to the same effect. (Refund of bridge tolls for troops and vehicle movements. General Bridge Act applied.) *Bellaire, Benwood & Wheeling Ferry Co.* v. *Interstate Bridge* (1930) 40 F. (2d) 323. Cert. Den. (Paramount authority of the General Bridge Act over state authority applied to a competing bridge four miles from those of the instant case.) *People* v. *Hudson River Connecting R. R. Corp.* (1920) 228 N. Y. 204 (decided that the General Bridge Act of 1906 was an exercise of Congress' plenary power over interstate commerce and excluded any further action by a state; a conflicting New York statute struck down.) *Detroit International Bridge Co.* v. *American Seed Co.* (1930) 249 Mich. 289. (Supremacy of General Bridge Act of 1906 over State authority decided.)

Many of the bridges of the United States are actually operating under the direction of the Secretary of War, among them being a bridge within four miles of those in question. There are twenty-two interstate bridges over the Ohio River connecting the shores of West Virginia and those of Ohio or Kentucky (R. 11). Federal jurisdiction has been recognized as to a number (R. 11). The practical reasons for the exclusive policy of the Commerce Clause is demonstrated in this case when the State Road

Commission of West Virginia tries to control the rates of certain bridges in the same area where the rates of other bridges are actually controlled by the Secretary of War.

IV.

The West Virginia Act of the Legislature under which the State Road Commission of West Virginia purported to act recognizes the paramount authority of the Federal Government as respects tolls.

The Act of the Legislature of West Virginia under which the State Road Commission purported to act, so far as relevant, provides (Official West Virginia Code, Chapter 17, Article 17, Section 22, Serial § 1681).

> "Tolls shall be fixed, charged and collected for transit over such bridges * * * subject, however, to any applicable law or regulation of the United States of America now in force or hereafter to be enacted or made * * *."

(For the complete section see appendix p. 26.)

In the case of *Miller* v. *Huntington & Ohio Bridge Co.* (1941) 123 W. Va. 320, 15 S. E. (2d) 687, the Supreme Court of Appeals of West Virginia recognized (in a casual manner, however) that the tolls of the Huntington Bridge were under control of the Secretary of War.

The Supreme Court of Appeals of West Virginia in another (and kindred case) sustained its jurisdiction upon three grounds (copy of opinion, appendix to brief, p. 25).

First. That "no specific legislation pertaining to the subject matter has been enacted by the Congress".

Second. That "no regulatory action has been taken by the Interstate Commerce Commission or the Secretary of War".

Third. The matters involved are merely local.

Citing Public Service Commission v. *Harpers Ferry Bridge Co.* (1933) 114 W. Va. 291, 171 S. E. 760; *Missouri P. R. Co.* v. *Larabee Flour Mills Co.* (1909) 211 U. S. 612; *Northwestern Bell Tel. Co.* v. *Nebraska State Ry. Comm.* (1936) 297 U. S. 471.

Certainly the General Bridge Act of 1906 and its two amendments are as specific as language makes possible, and which, we respectfully urge, manifests the intention of the Congress to exercise control over tolls of bridges over navigable streams. Implicit in the above objection is the erroneous belief that until Congress acts, the states are free to regulate *directly* interstate commerce so far as the rates of toll of bridges over navigable streams are concerned.

The General Bridge Act of 1906 and its two amendments nowhere make its operation conditional on permissive action by the Secretary of War. Legislation does not depend upon the action or non-action of specific officials. The question was discussed in *Oregon & Washington R. Co.* v. *Washington* (1926) 270 U. S. 87, 46 Sup. Ct. 279, where the objection was raised as to the non-action of the Secretary of Agriculture to establish a quarantine under the Interstate Commerce Act and the Court holding that Congress by affirmative legislation had occupied the field of regulating commerce and so necessarily had excluded state action. The Secretary of War has in fact taken action under the General Bridge Act of 1906 and its Amendments, as appears from cases previously cited pp. 18-19).

The State of West Virginia has no extra-territorial jurisdiction. The bridges in question lie in two states. The State of Ohio manifestly would have the same right as West Virginia to prescribe tolls which demonstrates that neither state has the right. The police power of a state

cannot extend beyond its own borders. Within its borders, the police power of a state must be relevant to health, morals, public safety, and convenience, and such regulations can incidentally and indirectly (but never directly) affect interstate commerce. *Public Utilities Commission* v. *Attleboro* (1926) 273 U. S. 83.

The cases cited in the order of the Court below, do not sustain the reasons advanced.

Public Service Commission v. *Harpers Ferry Bridge Co.* (1933) 114 W. Va. 291, 171 S. E. 760. The authority of the Public Service Commission of West Virginia to regulate the rates of toll of the bridge over the Potomac at Harpers Ferry, connecting West Virginia and Maryland, was upheld. The Court commented that the Potomac did not appear to be navigable at Harpers Ferry, which fact is necessary for Federal jurisdiction. The General Bridge Act was not discussed, counsel agreeing that no Federal question was involved. None of the questions in the instant case were before the West Virginia court in the above case.

Missouri P. R. Co. v. *Larabee Flour Mills Co.* (1908) 211 U. S. 612. A state law required an interstate railroad carrier to treat all shippers alike, which was held to be within state power and conducive to the welfare and convenience of citizens of Kansas. The delegation of certain national powers to the Interstate Commerce Commission was not the equivalent of specific action of Congress in respect to the particular matters involved. The field wherein the state of Kansas acted was common law and not covered by the Interstate Commerce Act.

Northwestern Bell Tel. Co. v. *Nebraska State Ry. Comm.* (1936), 297 U. S. 471. This court held that "both the language of the statute (Interstate Commerce Act) and the

nature of its subject-matter, indicates that it contemplated no restriction of state control over depreciation rates until the United States Commerce Commission had presented its own rates".

None of these cases touch the question of state power directly to control interstate commerce (a field entirely withdrawn from state action) whether or not the Congress has acted.

Original Action for Writ of Prohibition in the Supreme Court of Appeals of West Virginia Proper.

The Supreme Court of Appeals of West Virginia is given original jurisdiction in cases of prohibition by Article 8, Section 3 of the Constitution of West Virginia, and by Chapter 51, Article 1, Section 3 of the Official Code of West Virginia. It is likewise held in West Virginia that the fixing of rates is quasi-judicial and the public body so doing is subject to the writ of prohibition to correct an excess of jurisdiction. *Huntington Chamber of Commerce* v. *Public Service Commission* (1919), 84 W. Va. 81, 99 S. E. 285.

The obstruction to the free flow of interstate commerce seems apparent; the increase of rates of toll one hundred and fifty per cent (150%) introduces serious consideration as regards the fares of the petitioners. Former patrons of the bridges now travel from the Island to the east shore of the Ohio River and return toll free, and what they formerly paid in tolls is now transferred and exacted from interstate traffic. Traffic intra the state of West Virginia is now toll free and its cost is cast wholly upon the interstate users. Moreover the burden among interstate users is shifted, as the alterations in classifications show, to those users of the bridges whose rates are fixed by national authorities, and hence affect thousands of people indirectly who must use public conveyances. The possibilities for

further juggling of the burdens is endless. We firmly believe this cause is one which should receive a determination from this Court, and respectfully submit that the petition for certiorari should be allowed.

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